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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 83

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Petitioner,

vs.

W. E. CARROLL, CLARENCE H. CALHOUN, MRS. HATTIE J. PICKARD, MRS. EMMA B. MOORE, AND SAM PICKARD, TRUSTEE FOR SAM PICKARD, JR.,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Introductory Statement

This case is here on certiorari to review the judgment of the Court of Appeals of Georgia entered on October 27, 1948, affirming the judgment of the Superior Court of Fulton County, Georgia, in favor of the respondents and against petitioner (R. 138) and the judgment entered December 15,

1948, denying rehearing (R. 148). A petition for a writ of certiorari to the Supreme Court of Georgia was filed on January 9, 1949 (R. 149) and was denied on March 16, 1949 (R. 150).

Opinions Below

The judgment of the Superior Court of Fulton County, Georgia (R. 122) is unreported. The opinion of the Court of Appeals of Georgia of October 27, 1948 and the denial of the motion for rehearing (without opinion) on December 15, 1948 are reported in 78 Georgia Appeals Reports 292, 50 S. E. (2d) 808. The denial of the petition for certiorari to the Supreme Court of Georgia (without opinion) on March 16, 1949 is reported in 78 Georgia Appeals Reports 898.

Jurisdiction

The judgment of the Court of Appeals of Georgia, upon which rehearing was denied on December 15, 1948, and upon which a writ of certiorari to the Supreme Court of Georgia was denied, was entered March 16, 1949. Certiorari was granted by this Court on October 17, 1949. The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code, as amended by the Act of June 25, 1948 (Title 28, United States Code, Section 1257(3)), on the ground that the decision below denied a title, right, privilege, and immunity claimed by petitioner under the Communications Act of 1934, particularly Sections 307(a), 308(b), 309(a), 310(b) and 402(b) thereof, and on the further ground that the judgment of the Court of Appeals of Georgia violates the provisions of Article VI of the Constitution of the United States.

Questions Presented

1. Whether a decision of the Federal Communications Commission, holding that a particular contract made between a radio station licensee and third parties adversely affects the ability of the radio station to properly function in the public interest, is a determination binding upon a state court under Article VI of the United States Constitution, or whether the state court may ignore that determination and rule to the contrary.

2. Whether a state court may substitute its judgment for that of the Federal Communications Commission as to the effect of such a contract upon the ability of a radio station to function in the public interest.

3. Whether a state court, by substituting its judgment for that of the Federal Communications Commission as to the effect of a particular contract upon the ability of the radio station to function in the public interest, collaterally attacks a decision of the Federal Communications Commission and invades the exclusive jurisdiction vested in the Federal Communications Commission under the provisions of the Communications Act of 1934, and amendments thereto, by annulling in legal effect, the orders of the Commission of September 19, 1945 and November 9, 1945.

4. Whether the decision below was contrary to the decisions of the Supreme Court of the United States construing the Communications Act of 1934, by giving effect to private contractual rights of parties superior to and in conflict with the power of federal regulation under the Communications Act of 1934.

Statutes Involved

Article VI of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The applicable sections of the Communications Act of 1934, as amended, to-wit: Sections 307(a), 308(b), 309(a), 310(b) and 402(b), (c), (d) and (e) are set forth in Appendix A (*infra*, pp. 44-47).

Statement of the Case

The decision and judgment of the Court of Appeals of Georgia herein complained of arises out of the following situation:

The Original Situation

Petitioner owns and operates Radio Station WGST, in the City of Atlanta, as a trust for and on behalf of the Georgia School of Technology. On June 18, 1936, petitioner entered into a management contract with Southern Broadcasting Stations, Inc. for a period ending January 6, 1950. Under the terms of the management contract Georgia Tech was receiving ten per cent of the gross receipts from the operation of the station. This was the situation on January 31, 1940 when the Georgia School of Technology filed its application for renewal of its broadcasting license with the Federal Communications Commission (hereinafter referred to as the Commission).

First Proceedings Before the Commission

Instead of renewing the station's license, the Commission challenged the propriety and legality of the further operation of Radio Station WGST by petitioner through Southern Broadcasting Stations, Inc. as being not in the public interest, and as being in contravention of the Federal Communications Act.

Southern Broadcasting Stations, Inc. thereupon intervened in the matter. After hearing, the Commission issued proposed findings of fact and conclusions of the Commission on March 23, 1943 (R. 33). The findings of fact and conclusions were extensive. In substance it was determined by the Commission that the station, under the contract with Southern Broadcasting Stations, Inc., was being operated in violation of the Federal Communications Act and that public interest, convenience and necessity would not be served by a renewal of license with the management contract in force. It was further determined that the failure to comply with the provisions of the Federal Communications Act was due to "misunderstanding and lack of knowledge rather than to bad faith on the part of" Georgia Tech, and it was provided that the Commission would consider a second application for renewal of license, provided assurance was given that the full responsibilities of a licensee would be assumed. It was directed that in the second application there should be set forth "the plan of the Station for the acquisition of the necessary facilities and equipment, and for the business management, representation, and control of its future operations . . ." On May 8th, 1943 the proposed findings and conclusions of March 23, 1943 were made the findings and conclusions of the Commission (R. 46).

The Contract of April 15, 1943

As a result of this action by the Commission, representatives of petitioner entered negotiations with representatives of respondents (the latter being all the stockholders of Southern Broadcasting Stations, Inc.). Out of these negotiations came the contract of April 15, 1943 which forms the basis for this suit (R. 12). By said contract petitioner acquired all the capital stock of Southern Broadcasting Stations, Inc., procured the transfer of all the assets of the corporation to petitioner, and thereafter, in July of 1943, dissolved the corporation by surrendering its charter in Fulton Superior Court. Under the terms of the contract of April 15, 1943, petitioner agreed to pay to Fulton National Bank, as agent of the respondents, as the purchase price of the capital stock of the corporation, fifteen per cent of the net billings (gross receipts) of Radio Station WGST "from the sale of time on the air for any and all types of broadcasting, visual or sound, including any and all revenues which may be derived from such sources as a result of any new developments in the broadcasting field" for a period of 80¾ months and until January 6, 1950.

Further Proceedings Before the Commission

Thereafter, on May 22, 1943, petitioner filed its second application for a renewal of its license. As an exhibit to the second application for license renewal petitioner attached a copy of the contract of April 15, 1943 as its plan for acquiring the necessary facilities and equipment of Southern Broadcasting Stations, Inc., including the business management, representation and control of the future operations of the station (R. 48). Petitioner requested the Commission to grant the license applied for without hearing (R. 55), but this was denied (R. 63).

Thereafter the matter was heard by the Commission. After consideration of the application and the testimony presented by petitioner, the Commission issued proposed findings of fact and conclusions of the Commission on September 19, 1945 (R. 64). In substance the Commission found "*that the arrangements under the contract of April 15, 1943 would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest, and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application*" (R. 70). As additional reasons for determining that public interest, convenience or necessity would not be served by granting the license to the station with the contract of April 15, 1943 in force, the Commission concluded that the payments of 15% of the gross income of the station would have the effect of hampering and restraining the station from entering the fields of Frequency Modulation and Television broadcasting (R. 70). The Commission further concluded that the arrangements under the contract of April 15, 1943 would amount to the respondents receiving indirectly what the Commission had determined by its orders of March 23rd and May 8th, 1943 could not be received directly by Southern Broadcasting Stations, Inc. because of violation of the Federal Communications Act. This, the Commission said, "would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act" (R. 71).

By the order of September 19, 1945 the Commission determined that a granting of the second application for license renewal would not serve the public interest, convenience or necessity and should therefore be denied, but without prejudice to the filing of a further application by petitioner before December 18, 1945, "*provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and South-*

ern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 [the proceedings on the first application for license renewal] *and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest"* (R. 71).

The Action Taken by Petitioner

Upon receipt of the order of the Commission of September 19, 1945, petitioner made no further payments under the contract of April 15, 1943, and on October 11, 1945, the Board of Regents, the governing body of petitioner, passed the following resolution:

> "Resolved, by the Board of Regents of the University System of Georgia, that the ruling of the Federal Communications Commission having made the contract with the stockholders of Southern Broadcasting Stations, Inc. legally impossible of performance, the board hereby approves the action of its WGST Radio Committee in directing that said contract be not further complied with. This action is taken without prejudice to a fair adjustment or settlement of whatever rights the said stockholders may have, subject to the approval or consent of the Federal Communications Commission" (R. 72).

On November 9, 1945 the proposed findings of fact and conclusions of September 19, 1945 were adopted by the Commission as its findings of fact and conclusions upon the second application of petitioner for renewal of the license of Radio Station WGST (R. 72).

The Third Application for License Renewal

On December 4, 1945 petitioner filed its third application for license renewal. At the same time it filed an application for a construction permit. As an exhibit to both

applications it filed a statement affirmatively showing that no further effect was being given to the agreements condemned by the Commission (R. 79). Thereafter, on March 7, 1946, the application was granted and the license renewal was issued (R. 81).

From the time in 1940 when petitioner's previous license expired until the issuance of the license renewal on March 7, 1946, Station WGST continued operations under temporary licenses granted by the Commission. Since the issuance of the license of March 7, 1946 there has been another license renewal on May 1, 1947, which runs until May 1, 1950. The radio station is being currently operated under this license.

Proceedings in the Trial Court

From September 19, 1945 until June 18, 1947 the respondents took no action. They then filed suit in Fulton Superior Court for an accounting and for a judgment for 15% of the gross income from the operation of the station from August 1, 1945 to date of judgment (R. 9).

Petitioner filed its answer in which it admitted that prior to the decision of the Commission on September 19, 1945 it had paid under the contract the sum of $149,408.38. It admitted the execution of the contract of April 15, 1943 and admitted a prima facie case on behalf of the respondents. Further answering it set up as an affirmative defense the actions of the Commission and petitioner as heretofore outlined in this statement of facts (R. 17-23). By amendment petitioner showed that, according to its books and records, 15% of the net billings (gross income) of Radio Station WGST, from August 1, 1945 through August 31, 1947 amounted to the sum of $144,968.63 (R. 85).

By agreement of all parties, all matters of law and fact were submitted to the trial court, sitting without the intervention of a jury. The case was tried upon an agreed statement of facts, stipulations of the parties and certain docu-

mentary evidence introduced without objection. Evidence was introduced in support of the statement of facts heretofore set out.

In addition it was stipulated between the parties that Southern Broadcasting Stations, Inc., which was owned by respondents prior to April 15, 1943, was a party as intervenor to the proceedings before the Commission which resulted in the proposed findings of fact and conclusions of the Commission of March 23, 1943, whereby the first application of petitioner for license renewal was denied. These proceedings were designated by the Commission as Docket Number 5903 (R. 94).

It was further stipulated that respondents had *actual knowledge* of the filing by petitioner of the second application for renewal of license and which was designated by the Commission as Docket Number 6534; that respondents had *actual notice* of the order of the Commission, dated October 12, 1943, assigning the matter for hearing; that respondents had *actual knowledge* of the hearing before the Commission and of the proposed decision of September 19, 1945; that respondents also had *actual knowledge* of the final order of the Commission, dated November 9, 1945, wherein petitioner's second application for license renewal was denied; and that the respondents had actual knowledge of such matters *at the times said matters were taking place* (R. 94).

Evidence was introduced to show that under the law and the rules of the Commission respondents had the right at any time to intervene in the proceedings on the second application for license renewal, just as Southern Broadcasting Stations, Inc. had intervened in the proceedings on the first application; that the right of intervention existed after, as well as before, the ruling of the Commission on the second application; and that respondents had the same right of statutory appeal as petitioner from the denial by the Com-

mission of the second application for license renewal (R. 97).

It was stipulated by the parties that at the time the respondents entered into the contract of April 15, 1943 with petitioner they knew that the operation of Radio Station WGST depended upon a license so to operate from the Commission and that said operation was subject to Federal regulation and control under the Communications Act of 1934, as administered by the Commission (R. 95).

And it was stipulated that *the respondents also knew that under the Communications Act of 1934 the Commission had jurisdiction over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest* (R. 95).

It was likewise stipulated that in the hearing before the Commission based upon the notice of such, dated October 12, 1934 (the hearing on the second application for license renewal) the evidence as to the value of the equipment of the radio station acquired by the petitioner from the respondents or Southern Broadcasting Stations, Inc. ranged between $40,000.00 and $70,000.00 and that at that time, which was in 1943, such equipment was very difficult, if not impossible, to acquire (R. 95).

It was also stipulated that the license under which Radio Station WGST was operating in April of 1943 was a temporary license and extension of its prior license, and that said license and extension of said license had expired (R. 96).

The Judgment and Decree in the Trial Court

At the conclusion of the evidence, and after hearing oral argument, the Court took the matter under advisement, and thereafter, on October 6, 1947, passed a preliminary

order and decree finding *that the Commission was without jurisdiction to nullify, change or anywise modify the duties and obligations of the parties to the contract of April 15, 1943, that the action of the Commission did not constitute a valid defense or bar as a matter of fact or law to the rights of the respondents to enforce the provisions of the contract, that said actions did not render further performance of the contract by petitioner impossible,* that respondents were entitled to an equitable accounting, and that they were entitled to a decree in this case ordering petitioner to pay to them 15% of the gross income of the station from August 1, 1945 to September 1, 1947 (R. 108). Thereafter on October 10, 1947, a final order, judgment and decree was entered in favor of the respondents and against petitioner in accordance with the preliminary order of October 6, 1947 (R. 122).

The Decision of the Court of Appeals of Georgia

Petitioner brought the case to the Court of Appeals of Georgia, which court affirmed the judgment of the trial court. In the course of its opinion the Court of Appeals of Georgia held:

> ". . . but nothing in the power granted to the Commission, or in said communications act of Congress, gives to the commission the power and authority to regulate the private contracts and business of those operating radio-broadcasting stations, where the same is not necessary in the protection of the public interest, and where such contracts do not affect the interstate transactions of the radio station" (R. 127).

> "It does not appear that the subject matter of the contract was affected with such a public interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress under the authority of the commerce clause of the Constitution with the power to license radio-broadcasting stations,

and to regulate their interstate transactions, . . ." (R. 136).

"It cannot be anticipated that the contract sued on, insofar as it related to the payment of the agreed purchase-price of this stock and of the assets of the corporation, giving to the regents complete control of the radio station and its operation, would so far affect the financial ability of the radio station as to render the station unable to operate in the public interest. The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137).

". . . it not appearing that the payment of such purchase-price would render the radio station unable to operate in the public interest . . ." (R. 137).

"Judge Almand [the trial judge] denied the contentions of the defendant as to the legal impossibility of performing the contract sued on by reason of an act of law, and that the Regents were therefore excused from performance; and ruled that the Federal Communications Commission was without power to take any action which would have the effect of nullifying, changing, or in any wise modifying the duties and obligations of the parties to said contract thereunder, . . ." (R. 130).

"Taking the above view, the other contentions of the regents are necessarily to be determined adversely to the regents and are controlled thereby, and the trial judge's ruling and judgment excepted to were not erroneous for any of the reasons assigned" (R. 138).

Specification of Errors to Be Urged

The Court of Appeals of Georgia erred:

(1) In failing to give effect to the determination of the Communications Commission that the contract in controversy adversely affects the ability of the radio station to function in the public interest.

(2) In determining that the contract does not affect the ability of the radio station to function in the public interest when the Communications Commission, the agency designated by the Congress to decide such questions, has determined, after full hearing, exactly the contrary.

(3) In substituting its judgment for that of the Commission in regard to a matter of both public and private concern and as to which the Congress has vested exclusive jurisdiction in the Commission and has provided that its determination is binding and conclusive unless and until reversed on appeal as provided by statute.

(4) In collaterally attacking the decision of the Commission upon the matter in violation of Article VI of the United States Constitution.

(5) In nullifying, by its decision, the prior decisions of the Communications Commission relative to the contract in controversy, and in effect requiring petitioner to specifically perform a contract which the Commission has declared cannot be performed consistent with the public interest.

(6) In its opinion of October 7, 1948 by holding "The evidence fails to show that the contract would affect the public interest in reference to the broadcasts of this station" (R. 137) and by holding ". . . it not appearing that the payment of such purchase-price would render the radio station unable to operate in the public interest . . ." (R. 137).

(7) In failing to recognize and respect the principle enunciated by this Court that the right of private contract must give way to the exigencies of the public welfare when determined in an appropriate manner by proper authority, and the further principle that those who contract with reference to the business of radio broadcasting have no rights superior to the exercise of the power of federal regulation under the Communications Act of 1934.

(8) In failing to give effect to the determination of the Commission condemning the contract as contrary to the public interest and adjusting the rights of the parties thereto in the light of that determination.

(9) In ruling that the Commission "was without power to take any action which would have the effect of nullifying, changing or in any wise modifying the duties and obligations of the parties to said contract . . ." (R. 130, 138).

(10) In failing, because of the foregoing, to sustain the defense of petitioner to the suit.

(11) In depriving petitioner, through the foregoing, of the rights, privileges and immunities vested in it under the Communications Act of 1934.

Summary of the Argument

I. The judgment of the court below improperly fails to give effect to the determination of the Commission upon a matter clearly within its jurisdiction and invades the jurisdiction of the Commission in a field in which federal power is exclusive.

(a) The court below has decided issues of public as well as private concern over which the Communications Commission has been vested by Congress with exclusive jurisdiction. The determination as to the public interest involved in the grant of a radio station license, including the effect of a licensee's contract upon his ability to operate in the public interest, is a matter over which the Commission has sole jurisdiction under Section 308(b) of the Communications Act.

(b) The Commission, after extensive hearings, had determined that the contract in controversy adversely affected the ability of the station to properly function in the public interest. There was ample evidence before the Commission upon which to predicate its determination that the contract was contrary to the public interest and violative of the provisions of the Communications Act. The Commission did not pass upon the validity of the contract as measured by the law of contracts *per se*, but rather determined in a licensing proceeding that the burdens of the contract would adversely affect the operation of the station in the public interest and would be a continuing means of violating the provisions of the Communications Act. In so doing the Commission was complying with its congressional mandate to see to it that the people of the United States have the best possible radio service.

(c) The Court below improperly failed to give effect to the determination of the Commission that the contract ad-

versely affected the ability of the radio station to function in the public interest and instead reached the exactly opposite conclusion. In short, the lower court substituted its own judgment for that of the expert body created by Congress to determine such matters.

(d) The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution. The decision of the Commission, lawfully made by it under authority granted by Congress, becomes part of the supreme law of the land, and as such must be respected by the courts of Georgia, and a state court is without power to ignore that decision, or substitute another decision for it. If the federal administrative scheme is to work in the highly complex and competitive field of radio, the decisions of the administrative body must be given effect by the courts.

II. The decision of the Commission regarding the effect of the contract upon the public interest in the operation of the radio station was binding upon the respondents although they were not formal parties to the second application for license renewal.

(a) The corporation owned by respondents was a party by intervention to the hearings upon the first application for license renewal. The decision of the Commission denied the license and condemned the arrangement under which the station was managed by respondents' corporation as contrary to the public interest and in violation of the Communications Act. No appeal was taken from the decision of the Commission and it was binding alike upon the management company and petitioner.

(b) The contract with respondents was made as a result of the decision of the Commission on the first application for license renewal and in an effort to comply with that

decision. Clearly the parties intended to contract with relation to the provisions of the Communications Act.

(c) Respondents had actual notice and actual knowledge of the hearing before the Commission resulting in the condemnation of the contract as contrary to the public interest. They had actual knowledge of the decision of the Commission in regard thereto. These facts are stipulated in the record. It is also clear from the record that respondents were notified more than a month prior to the time that the Commission's decision became final that petitioner would not carry the litigation further.

(d) Respondents as aggrieved parties whose interests were adversely affected by the decision of the Commission denying the renewal of license and condemning the contract as contrary to the public interest had the same right of statutory appeal under Sec. 402(b) of the Communications Act as did petitioner. Respondents had the right to intervene at any time before the Commission, either before or after its decision. They had the right to appeal the Commission's decision as provided by the Act, even though there was no intervention before the Commission. They did not intervene and no appeal was taken, although respondents had ample time to do either after notice from petitioner that it did not intend to appeal. As interested parties it was their responsibility to be alert to protect their interests. Failing to do so, they cannot now be heard to complain that the ruling of the Commission does not affect them because they were not formal parties to the proceedings. The Commission's decision is now final and binding upon petitioner and respondents alike.

III. The decision below, in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934, was contrary to the prior decisions of this Court.

(a) Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation. This must be so if the federal regulatory scheme is to be maintained as a vital and effective instrument "to secure the maximum benefits of radio to all the people of the United States". Radio broadcasting is peculiarly interstate in character and this Court has frequently observed that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing contractual arrangements which would conflict with the execution of its policy for the good of the people as a whole.

(b) Private contractual rights in the field of radio must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper administrative agency. When the public interest is involved there arises a limitation upon the absolute freedom of contract. To the extent that a contract conflicts with the declared public interest the courts will decline to enforce it. This is none the less so because the recognition of this principle may diminish or even destroy the value of the offending contract. Such contracts must necessarily be regarded as having been made subject to the possibility that regulation in the public interest may render them unenforceable or impair their value.

(c) The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission. The Commission's decision that the contract was inconsistent with the operation of the station

in the public interest was binding upon petitioner and respondents alike and not subject to collateral attack. Nor can that decision be set at naught by a decree in the state court which in effect directs petitioner to do the very thing which the Commission has expressly forbidden it to do. Further performance of the contract is therefore impossible and thus legally excused. But the respondents are not remediless. They have their relief in the equities of the situaiton and are entitled to receive, not the strict measure of consideration called for by the contract itself, for that would violate the declared public interest, but the fair value, the reasonable value of what petitioner received from them. This determinaiton of fair value has never been made by any court.

ARGUMENT

This case presents a conflict between the authority and jurisdiction of the Federal Communications Commission, under the Communications Act of 1934, and the authority and jurisdiction of the Georgia State Courts, with respect to the binding effect of a determination by the Commission that a particular contract adversely affects the ability of a radio station to function in the public interest. It squarely raises the question whether, in a suit in the state courts upon that contract, the state courts are free to determine, contrary to the finding of the Commission, that the contract does not affect the ability of the radio station to function in the public interest, and give damages for its breach, or whether the state courts are bound by the determination of the Commission and must adjust the rights of the parties in the light of that determination.

I

The judgment of the court below improperly fails to give effect to the determination of the Commission upon a matter clearly within its jurisdiction and invades the jurisdiction of the Commission in a field in which federal power is exclusive.

(a) *The court below has decided issues of public as well as private concern, over which the Communications Commission has been vested by Congress with exclusive jurisdiction.* This case does not involve the preservation of the delicate balance between federal and state power. The court below, at the outset, recognizes the power of the Commission over the grant of radio licenses in the public interest and jurisdiction to pass upon a contract affecting the ability of a radio station to so operate in the public interest. It then concludes that "The evidence fails to show that the contract would affect the public interest in reference to

the broadcasts of this station" (R. 137). The court further concluded that it did not appear "that the payment of such purchase price would render the radio station unable to operate in the public interest. . . ." (R. 137). The actions of petitioner before the Commission and the Commission's decisions were pleaded (R. 18-84), and introduced in evidence in the trial court (R. 89-94). The court below ignored the decisions of the Commission in order to give effect to the private contractual claims of the respondents.

The conclusions reached by the state court, we submit, clearly involve judgments on issues in which the public as well as the contracting parties were interested and over which the Federal Communications Commission had exclusive jurisdiction under Sec. 308(b) of the Communications Act, insofar as the burdens of the contract affected the ability of the station to function in the public interest.

In granting a license, or renewal of license, the Commission is charged with the responsibility of investigating all factors and all matters, financial and otherwise, bearing upon the ability of a radio station to function in the public interest. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475. The authority of the Commission to pass upon issues relating to the public interest raised by contracts between licensees and third persons is put beyond question by the decisions of this Court in the Networks Cases, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *National Broadcasting Company* v. *United States*, 316 U. S. 447; and *National Broadcasting Company, et al.* v. *United States*, 319 U. S. 190.[1]

(b) *The Commission, after extensive hearings, had determined that the contract in controversy adversely affected the ability of the station to properly function in the public*

[1] See also: *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244 (C.A. D.C.).

interest. Pursuant to its statutory duty the Commission made inquiry into the application for renewal of license filed by petitioner on January 31, 1940. After hearing it determined that the station was being illegally operated under a management contract whereby petitioner had abdicated its duties and responsibilities as a licensee. License renewal was denied, but petitioner was permitted to file a second application for renewal, at which time it was required to show that it had resumed complete control and management of the operations of the station and that it would thereafter assume the full responsibilities of a licensee and operate in conformity with the Communications Act. In an effort to comply with this decision of the Commission, the contract in controversy was made. It was the solution proposed by the parties whereby the old management set-up would be completely eliminated and future operations would be in conformity to the Act. Predicated upon the contract the second application for license renewal was made. After a full hearing the Commission determined that the contract of April 15, 1943 placed such financial burdens upon the station that it could not properly function in the public interest, and that its future operation in the public interest was seriously jeopardized (R. 70). The Commission had additional objections to the operation of the station with the contract in effect. It felt that the burdens of the contract would hamper the station in its expansion into the fields of FM and Television broadcasting (R. 70). It also challenged the contract on the ground that it was an effort to condone a previous illegal arrangement condemned by the Commission and would be a continuing means of violating the provisions of the Communications Act (R. 70). In the light of these findings the Commission concluded that the grant of a license to petitioner with the contract in force would not be in the pub-

lic interest and denied the application (R. 71).[2] It can hardly be disputed that the action of the Commission was within the plenary authority granted it by the Congress to protect, promote and decide all questions affecting the public interest in the field of radio broadcasting. The Commission did not attempt to pass upon the validity of the contract as measured by the law of contracts *per se*, but rather it concerned itself in a licensing proceeding with the effect of the contract upon the financial ability of the station to operate in the public interest, its effect upon the ability of the station to expand into new fields of broadcasting in the public interest and its effect upon the efforts of the Commission to enforce the provisions of the Communications Act. In so doing the Commission was complying with its

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[2] The findings and decision of the Commission were as follows:

"4. In view of the foregoing, the Commission concludes that the arrangements under the contract of April 15, 1943, would jeopardize the licensee's financial ability to conduct the future operation of the station in the public interest and that, therefore, public interest, convenience or necessity would not be served by a grant of the instant application.

"5. There are additional reasons why under the arrangements made in the contract of April 15, 1943, public interest, convenience or necessity would not be served by a grant of this application. The assumption by the applicant of a burden amounting to 15% of its gross income resulting not only from the operations of Station WGST but from all new broadcasting developments, including FM and television, would have the effect of restraining the licensee from entering the field of FM and television broadcasting. Such a restraint does not appear to be in the public interest.

"6. Moreover, it seems clear that the payments of 15% of the gross income represent an effort on the part of the parties to give further effect to the agreement by which control of Station WGST had been illegally transferred to Southern Broadcasting Stations, Inc. As pointed out, these payments are to continue to January 6, 1950, the date when the 1936 agreement would have expired if that contract had not been terminated. Southern Broadcasting Stations, Inc. asserts ownership to the equipment of WGST, which has an estimated value of $50,000, but its title has been questioned. Aside from that, it does not now have and never has had any legal interest in the operation of the station. Accordingly, the payments provided for in the contract of April 15, 1943, and estimated on the basis of the station's present operations to total over $300,000 represent a payment to Southern Broadcasting Stations, Inc. far

mandate from Congress to see to it that the people of the United States "have the best possible radio service." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 Fed. (2nd) 235, 237 (C. A. D. C.) [3]

(c) *The court below improperly failed to give effect to the determination of the Commission that the contract adversely affected the ability of the radio station to function in the public interest and instead reached the exactly opposite conclusion.* Without conducting any hearing upon the subject, and with no evidence before it except the contract itself and the record of the proceedings before the Commission, including the decisions of the Commission, the court below made a determination that the contract *did not* affect the ability of the station to function in the public interest, a determination completely contrary to that reached by the Commission.

The state court's ruling that "It does not appear that the subject-matter of the contract was affected with such a pub-

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in excess of that Corporation's legal interest, if any, in WGST. A grant of the renewal application under circumstances where a party to an arrangement found by the Commission to be in contravention of law would continue to profit from such arrangement would not be in the public interest since it would, in effect, condone such illegality and thwart the Commission's efforts to enforce the requirements of the Act.

"7. Therefore, the Commission concludes that a granting of this application of the Georgia School of Technology for renewal of the license of Radio Station WGST would not serve the public interest, convenience or necessity. The application, therefore, should be denied, without prejudice, however, to the submission within ninety days by the Georgia School of Technology of a new application for a construction permit and license to operate on the same frequency, provided it is affirmatively shown that no further effect is given to the agreements between the Georgia School of Technology and Southern Broadcasting Stations, Inc., which the Commission has found in Docket 5903 and in this proceeding to be contrary to the Communications Act and incompatible with the operation of the station in the public interest."

[3] See: Sections 307(a), 308(b), 309(a) and 310(b), Communications Act of 1934; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

lic interest as to justify the same to be nullified by the order of a governmental agency, charged by act of Congress . . . with the power to license radio broadcasting stations, and to regulate their interstate transactions . . ." (R. 136) is all the more remarkable when it is seen from the record that:

1. It was stipulated that without a license from the Commission the radio station could not be lawfully operated (R. 90).

2. It was stipulated that at the time respondents entered into the contract of April 15, 1943 with petitioner they knew that the operation of Radio Station WGST depended upon a license so to operate from the Commission and that said operation was subject to federal regulation and control under the Communications Act of 1934, as administered by the Commission (R. 95).

3. It was stipulated that respondents also knew that under the Communications Act of 1934 the Commission had jurisdiction *over any contract or agreement affecting the operation of a radio station in the public interest or affecting the present or future financial ability of a radio station to operate in the public interest* (R. 95).

4. The Commission, after hearing, specifically found that *this contract had that very effect* (R. 70).

(d) *The ruling of the court below collaterally attacks the decision of the Commission in violation of Article VI of the Constitution.* A decision of the Commission made pursuant to its statutory duty and clearly within the jurisdiction conferred upon it by Act of Congress cannot be collaterally attacked in the courts of Georgia. Nor can the state courts substitute their judgment for that of the Commission as to what adversely affects the ability of a radio station to function in the public interest. A statutory method of

appeal is provided by the Communications Act (Sec. 402(b), (c), (d), and (e)), and it is the *only* method by which a ruling of the Commission can be reversed or set aside. "The judgment of the trial court and jury cannot be substituted for that of the Commission." *Atchison, Topeka & Sante Fe Ry.* v. *Scarlett*, 300 U. S. 471, 474.

Under our increasingly complex system, administrative agencies, with their specialized knowledge and expert approach, necessarily sprang up. In a rapidly expanding and highly competitive field like radio it was imperative that there be one expert body, acting under one law for all the states, to assure the listening public the maximum of broadcasting service.[4] In the administrative scheme, adequate provision is made for hearing and appeal by all interested parties. If the administrative scheme is to work, the decisions of the administrative body must be given effect by the courts. So long as they are supported by evidence such decisions are, and should be, conclusive. "So long as there is warrant in the record for the judgment of the expert body it must stand." *Rochester Telephone Corp.* v. *United States, et al.*, 307 U. S. 125, 145.[5]

Upon the question of the finality of an order of the Communications Commission, and its freedom from collateral attack, the decision of the Court of Appeals of the District of Columbia in *Black River Valley Broadcasts, Inc.* v. *McNinch, et al.*, 101 Fed. (2nd) 235 (C. A. D. C.) at page 237, is most illuminating:

> "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have

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[4] Cf: *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Company*, 289 U. S. 266, 279; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 217.

[5] See also: *Yankee Network* v. *Federal Communications Commission*, 107 Fed. (2nd) 212, 226 (C.A. D.C.).

the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence. Federal Radio Commission *v.* Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.

"In the Act, Congress has made this Court the sole appellate body (with right to petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

In related fields it is equally well settled that the determination of a federal agency may not be collaterally attacked but may be challenged only in the appropriate review proceedings established by law. In *Venner* v. *Michigan Central Railroad Company*, 271 U. S. 127, it was specifically held that a state court is without jurisdiction to pass on the validity of an order of the Interstate Commerce Commission in a suit by a stockholder against a railroad to enjoin it from carrying out an agreement, the performance of which was authorized by the Interstate Commerce Commission. In holding that such a suit invaded the exclusive jurisdiction of the Commission the court said (page 130):

"We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the de-

fendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside."

The converse situation is presented here. The judgment of the court below is equivalent to an order to specifically perform what the Commission has been equally specific in saying the petitioner should not perform if it is to operate in the public interest. It is the clearest kind of collateral attack.[6]

The decision of the Commission, lawfully made by it under authority granted by Congress, becomes part of the supreme law of the land, which, under Article VI of the Constitution, is entitled to the same respect and dignity accorded to federal law, and the state courts of Georgia are without power to ignore that decision, or substitute another decision for it.[7] To do so violates the provisions of Article VI of the Constitution, and it makes no difference that the state court expresses a contrary policy. When Congress, in the

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[6] To the same effect, see: *Pennsylvania Co.* v. *United States*, 236 U.S. 351; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457; *Mississippi Valley Barge Line Co.* v. *United States, et al.*, 292 U.S. 282; *Hagens* v. *United Fruit Company*, 135 Fed. (2nd) 842 (C.C.A. 2); *Ingraham* v. *Union Stockyards Co.*, 64 Fed. (2nd) 390 (C.C.A. 8); *Berg, et al.* v. *Cincinnati, Newport & C. R. R. Co.*, 56 Fed. Supp. 842; *Harris* v. *Central Nebraska Public Power & Irrigation District*, 29 Fed. Supp. 425; *Southern Railway Company* v. *State of Georgia*, 188 Ga. 569, 4 S.E. (2d) 232; Note, 49 Columbia Law Review 855, 856 (June 1949).

[7] It has been recognized that the decisions of the Commission are to be accorded the same effect as rules and regulations laid down by it in the exercise of its statutory authority. *Regents of New Mexico College of A & M Arts* v. *Albuquerque Broadcasting Co.*, 158 Fed. (2nd) 900, 905 (C.C.A. 10). And it is well settled that the rules and regulations promulgated by the Commission, pursuant to its statutory authority, have the force and effect of Federal law. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418; *Regents of New Mexico College of A & M Arts* v. *Albuquerque Broadcasting Co.*, 158 Fed. (2nd) 900, 906; *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282, 285 (C.A. D.C.).

exercise of power confided to it by the Constitution, enacts legislation, it does so for all the people of all the states, and thereby establishes a policy for all. That policy is as much the policy of Georgia as if the enactment had come from the Georgia Legislature, and should be respected accordingly in the courts of that state. *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 57.[8]

It was the position of the respondents in the court below, and in their brief in opposition to the petition for certiorari, that the Commission was without power to take any action which would have the effect of nullifying, changing or in any way modifying the duties and obligations of the parties to the contract of April 15, 1943. In support of their contention they have relied upon the decision of this Court in *Radio Station WOW* v. *Johnson*, 326 U. S. 120. We submit that they have misconceived the bearing of that decision upon the instant case. In the *WOW* case, the matters which were adjudicated by the Supreme Court of Nebraska, including the issue of constructive fraud, had never been before the Commission and were never the subject of any findings or conclusions by the Commission with respect to the public interest. There is thus nothing in the facts or holdings of the case to support a conclusion that a state court has authority to disregard findings and conclusions of the Commission, relative to the public interest, in subsequent proceeding in the state courts. What the *WOW* case does hold is that the state courts are not deprived of authority to deal with innumerable issues of private law which may arise in connection with the operation of a radio station, merely because radio stations and licensees of such stations may be involved. But this obvious

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[8] See also: *Testa, et al.* v. *Katt*, 330 U.S. 386, 394; *Glover* v. *Mitchell*, 319 Mass. 1, 64 N. E. (2nd) 648; *Taylor* v. *Superior Motor Co.*, 227 N. C. 365, 42 S. E. (2nd) 460; *Federal Land Bank* v. *Shingler*, 174 Ga. 352, 361, 162 S. E. 815.

conclusion certainly lends no support to any further conclusion that where the Commission in the exercise of its authority under the Communications Act *does* make findings as to the public interest with respect to contractual and other relationships between licensees and third parties, the state courts are free to disregard those findings. Indeed, in the *WOW* case itself, this Court, while holding that the Nebraska court could properly deal with the issue of constructive fraud there involved, at the same time held that the state court must so frame its decree as not to encroach upon the jurisdiction of the Commission.

In its brief in opposition to the petition for certiorari respondents attach, as an appendix, a portion of the brief of the Commission filed in the Court of Appeals of the District of Columbia in the case of *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244. They contend that the position of the Commission in that case is "squarely in line" with their position in this case. However, neither the Commission's brief nor the holding of the Court of Appeals affords any support to respondents here. The discussion in the portion of the brief cited by respondents is clear on its face that it has reference to portions of the contract involved in the *Churchill* proceedings relating to provisions for the payment of money and reversion of physical properties in the event of non-payment, *as to which the Commission made no conclusions as to the public interest in its decision.* One of the grounds for the partial remand in the *Churchill* case was that the order of the Commission in effect required the abrogation of the entire contract although no findings were made that all features of the contract were contrary to the public interest. In the present case, there is no room for any contention that the Commission's decision did not make findings as to the public interest with respect to all features of the contract which were involved in the proceedings

below. It is in any event clear that the respondents had available an opportunity to raise all issues as to the adequacy of the Commission's findings and the possible effect on respondents' interest under the contract before the Commission itself and before the Court of Appeals of the District of Columbia under Sec. 402(b) of the Communications Act. They did not avail themselves of the opportunity, but chose to raise the issue collaterally in the Georgia State courts. This they cannot legally do.[9]

II

The decision of the Commission regarding the effect of the contract upon the public interest in the operation of the radio station was binding upon the respondents although they were not formal parties to the second application of petitioner for license renewal.

The trial judge seems to have given considerable weight to the fact that the respondents were not parties to the hearing before the Commission on the second application for license renewal. He made this the subject of a separate finding of fact (R. 109), and apparently this played a part in his determination that the Commission had no jurisdiction to affect in any wise the contract between petitioner and respondents. The Court of Appeals of Georgia likewise took note of this fact (R. 131) although it further noted that the respondents had knowledge of the proceedings. Before considering the legal aspects of the proposition let us review the facts.

(a) *The corporation owned by respondents was a party by intervention to the hearing upon the first application for license renewal.* When the Commission declined to re-

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[9] *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 Fed. (2nd) 235 (C.A. D.C.).

new the station license of petitioner upon its first application, the management company, Southern Broadcasting Stations, Inc., intervened. It participated in the hearing, and one of the respondents here, Clarence H. Calhoun, Esq., appeared as counsel for the management company before the Commission (R. 33). The decision of the Commission condemned the arrangement under which Southern was operating the station as being contrary to the public interest and in violation of the Communications Act and denied the application for license renewal unless the management company were wholly eliminated from the set-up. No argument would seem to be necessary to establish that the decision of the Commission was binding upon the management company as well as upon petitioner. No appeal was taken from this decision.

(b) *The contract with respondents was made as a result of the decision of the Commission on the first application for license renewal and in an effort to comply with that decision.* It was attached as an exhibit to the second application for license renewal as petitioner's plan to obtain the necessary equipment, management and control of the future operation of the station. The parties to the contract knew that they were dealing upon a subject controlled by federal law, and the legal principle is clear that they are presumed to intend to contract with reference to the provisions of that law.[10]

(c) *Respondents had actual notice and actual knowledge of the hearing before the Commission resulting in the condemnation of the contract as contrary to the public interest and actual knowledge of the decision of the Commission in*

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[10] See: *Federal Land Bank* v. *Shingler*, 174 Ga. 352, 361, 162 S. E. 815, where it is held: ". . . it is an established principle that parties dealing upon a subject controlled by a Federal law are presumed to intend to contract with reference to the provisions of that law."

regard thereto. It was stipulated that the respondents had actual knowledge of the filing of the second application for license renewal, of the order of the Commission assigning the matter for hearing, of the hearing before the Commission, of the proposed decision of the Commission of September 19, 1945 and of the final order of the Commission of November 9, 1945 denying the second application (R. 94). It was further stipulated that the respondents had actual knowledge of these matters at the times they were taking place (R. 95).

While these stipulations would appear to be controlling and conclusive, an examination of the record discloses an even stronger case for the proposition that the Commission's ruling is binding upon respondents, although they were not formal parties to the hearing on the second application. It has already been shown that one of the respondents appeared before the Commission as attorney for the management company on the first hearing for license renewal. The record discloses that this respondent, Mr. Calhoun, was fully familiar and conversant with Commission procedure, including matters of appeal. In the trial court respondents introduced in evidence letters from Mr. Calhoun to Mr. Marion Smith, Chairman of the Board of Regents, in which Mr. Calhoun suggested procedures for requesting rehearing and for appealing the proposed decision of the Commission of September 19, 1945 (R. 103). In his letter of September 28, 1945, Mr. Calhoun says:

> "I must apologize, of course, for suggesting the sort of argument to be used but I am moved to do this upon advice of competent authority, well-skilled in procedure, the acts and doings of the Commission." (R. 105).

Respondents also introduced in evidence the reply of Mr. Smith to Mr. Calhoun advising that petitioner felt it could not carry the litigation further. *This letter from Mr.*

Smith was written over a month prior to the final decision of the Commission on the second application (R. 106).

(d) *Respondents as aggrieved parties whose interests were adversely affected by the decision of the Commission denying the renewal of license and condemning the contract as contrary to the public interest had the same right of statutory appeal under Sec. 402(b) of the Communications Act as did petitioner.* The guarantees of due process under the Constitution are amply provided for by the terms of the Communications Act and the rules of the Commission which permit intervention by an interested party and appeal by any person aggrieved or whose interests are adversely affected by a decision of the Commission.[11] Under the law and the rules of the Commission the respondents were persons interested in the decision, and adversely affected thereby, and they had the right to intervene at any time before the Commission decision. They had the further right to seek rehearing and reconsideration of the decision. They also had the same right of appeal to the Court of Appeals of the District of Columbia as petitioner had. Respondents did not intervene and no appeal was taken, although they had ample time to do either after notice from petitioner that it did not intend to appeal.[12] In this connection it must be borne in mind that the Court is not here dealing with parties and interventions in a common law suit. Rather it is dealing with the rights and duties of parties as to intervention in the field of federal

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[11] Cf: Sec. 402(b)(2) Communications Act of 1934; Sec. 1.102 Commission Rules, introduced in evidence in trial court (R. 97).

[12] See: *Churchill Tabernacle* v. *Federal Communications Commission*, 160 Fed. (2nd) 244 (C.A. D.C.), where an appeal was taken by an aggrieved person under Sec. 402(b)(2) of the Communications Act, although not an original party to the hearing before the Commission. Intervention came after the record was closed, but before the decision of the Commission became final.

administrative law, where review proceedings are provided.

It has been held that Congress, in enacting the Communications Act of 1934, clearly evidenced a legislative intent that interested persons should be alert to protect their interests. This precise question was settled in *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282 (C.A. D.C.) (cert. denied 305 U. S. 625), in this pertinent language (page 286):

> "The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. It is more reasonable to assume in this case a legislative intent that an interested person should be alert to protect his own interests than to assume that Congress intended the Commission to consider on its own motion the possible effect of its action in each case, upon every person who might possibly be affected thereby. Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

It should be noted that in the *Red River* case the court observed that while the plaintiff was not a party to the proceedings before the Commission, it had *actual knowledge* of the proceedings while the right of intervention was open to it.

It is clear that the fact that the respondents were not parties to the proceedings before the Commission on the second application for license renewal cannot diminish the authority of the Commission to pass on the question of the public interest raised by the contract of April 1943. This very issue was decided by this Court in the case of *National*

Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350, wherein the Court rejected the contention that a decision of the Labor Board relative to a contract embodying unfair labor practices was invalid because of the absence of individual employees (parties to the contract) as parties to the cause. The *National Licorice* case thus clearly establishes the proposition that the failure of the respondents to become parties to the proceedings before the Commission on the second application for license renewal does not in any way impair the validity of the Commission's decision that the contract adversely affected the ability of the radio station to properly function in the public interest. Nor does it give the respondents, or the state courts, authority to ignore the action of the Commission and treat the contract as though the Commission had not made its ruling in respect to it.[13] The Commission's decision is now final and binding upon petitioner and respondents alike.[14]

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[13] See also: *Harris* v. *Central Nebraska Public Power and Irrigation District*, 29 Fed. Supp. 425; *Union Dry Goods Co.* v. *Georgia Public Service Commission*, 145 Ga. 658, 89 S.E. 779, affirmed 248 U.S. 372, in which the Supreme Court of Georgia held:

> "An order of the railroad commission, fixing a schedule of rates to be charged by public service companies in a given municipality, is not invalid solely because a contract-holder of one of the public service companies was not made a party and notified of the proceedings before the Commission."

[14] See: *Atchison, Topeka & Sante Fe Ry.* v. *Scarlett*, 300 U.S. 471; *Red River Broadcasting Co., Inc.* v. *Federal Communications Commission*, 98 Fed. (2nd) 282, (cert. denied 305 U.S. 625); *Black River Valley Broadcasts* v. *McNinch, et al.*, 101 Fed. (2nd) 235.

III

The decision below, in giving effect to private contractual rights superior to and in conflict with the power of federal regulation under the Communications Act of 1934, was contrary to the prior decisions of this Court.

It is apparent from the foregoing that the Georgia State courts are not free to disregard the decision of the Commission as to the effect of the contract upon the ability of the radio station to function in the public interest. It is equally apparent that aside from the regulatory power of the Commission over radio broadcasting, including contracts affecting the ability of a station to operate in the public interest, the contract would be enforceable under Georgia law. Here then is a serious conflict, but not an insoluble one. It has long been the law that where the public interest is involved there may well arise a limitation upon the rights and duties created by an otherwise enforceable contract. Examples are numerous. In the absence of the Anti-Trust laws there is nothing to prevent a contract or combination in restraint of trade in interstate commerce. In the absence of a statute against usury there is nothing violative of the law of contracts in a note calling for ten per cent interest. Except for the act establishing the Interstate Commerce Commission, and the regulations of that body, there is nothing unlawful in an agreement to settle a personal injury claim in exchange for an annual pass on the railroad. In our highly integrated society it has become necessary to provide by law that in certain fields the public welfare—the public interest—demands that certain restraints be placed upon the absolute freedom of contract.[15] To the extent that a contract conflicts with the declared public interest the courts will decline to enforce

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[15] *American Brake Shoe & Foundry Co.* v. *Pittsburgh Ry. Co.*, 270 Fed. 812.

it.[16] This is no new departure. It is a thoroughly established concept of our law.

(a) *Those who contract with regard to radio broadcasting necessarily do so subject to the paramount right of federal regulation.* Were this not so, then the integrity of the congressional scheme for the effective regulation of the business of radio in the public interest would be a hollow myth. We do not contend that those who engage in the radio business are wholly deprived of freedom of contract; nor do we contend that their every act is subject to regulation and control by the Commission. But we do contend that insofar as their acts or their agreements affect the public interest in connection with the broadcasts from their stations, they are subject to and subordinate to federal regulation and control under the Communications Act. This principle has been most forcefully stated by this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 282, in the following language:

> "Those who operated broadcasting stations had no rights superior to the exercise of this power of regulation. They necessarily made their investment and their contracts in the light of, and subject to, this paramount authority. This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises."

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[16] *Central of Georgia Railway* v. *Blount*, 238 Fed. 292 (CCA 5); *Seaboard Air Line Ry. Co.* v. *Atlanta, B & C RR Co.*, 35 Fed. (2nd) 609 (CCA 5) (cert. denied 281 U. S. 737) where it was held:

> ". . . a court of equity may refuse specific performance of a valid contract where, by granting that relief, a paramount public interest will or may be interfered with."

(b) *Private contractual rights in the field of radio must yield to the exigencies of the public welfare when determined in an appropriate manner by the proper administrative agency.* It is well established by the decisions of this Court that contracts made in relation to matters involving the public interest, and within the federal regulatory power, must necessarily be regarded as having been made subject to the possibility that the exercise of the regulatory power might render such agreements unenforceable or impair their value. *L & N R. R. Co.* v. *Mottley*, 219 U. S. 467, 482. To follow any other course would be to render sterile and impotent all federal regulatory power. In a variety of situations this Court has consistently upheld the supremacy of the power of regulation in the public interest and has declined to recognize contractual rights in conflict therewith. As to a contract procured through violation of the National Labor Relations Act, this Court ruled that "it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365. As to a contract of a railroad to furnish annual passes in exchange for settlement of a tort claim it was held that "after the commerce act came into effect no contract that was inconsistent with the regulations established by the Act of Congress could be enforced in any court" and that it was not determinative of the question that the construction of the Act by the Court would "render the contract of no value for the purposes for which it was made." *L & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 483. As to the contention that a public utility, having contracted to deliver electricity at a certain rate, could not charge a higher rate when authorized to do so by the public service commission, but was bound by its contract to charge the lower rate, this Court replied

that "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State. . . ." *Union Dry Goods Co.* v. *Georgia Public Service Commission*, 248 U. S. 372.

(c) *The determination of the rights of the parties must be made in the light of and with reference to the decision of the Commission.* Applying the foregoing legal principles to the case at bar, this situation appears. The Commission obviously had jurisdiction to make its finding that the burdens of the contract were contrary to the public interest involved. The decision of the Commission was binding upon both petitioner and the respondents. No appeal having been taken the Commission's decision was final and not subject to collateral attack. Nor can the Commission's decision be set at naught by a decree of the state court which in effect directs petitioner to do the very thing which the Commission has expressly forbidden it to do. The contract, being inconsistent with the decision of the Commission, cannot be enforced in any court. It has become legally impossible of performance.[17] The contract is valueless unless the radio station operates. Yet the station cannot legally operate so long as the contract is in effect. While there is much respectable authority for the proposition that impossibility excuses further performance and all contractual duties are thereby discharged,[18] it is not the contention of the petitioner that the respondents in these circumstances should be remediless. It has never been the position of the petitioner that it could keep what it has received from the re-

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[17] See: *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292 (CCA 5).

[18] See: *The Macon & Birmingham Railroad Co.* v. *Gibson*, 85 Ga. 1, 17, 11 S. E. 442; *Cowley* v. *Northern Pacific Ry. Co.* (Wash.) 123 Pac. 998; *Operator's Oil Co.* v. *Barbre*, 65 Fed. (2nd) 857, 862; *Malcomson* v. *Wappoo Mills*, 88 Fed. 680; *McElheney* v. *Jasper Trading Co.*, 12 Ga. App. 790, 78 S.E. 727; *National Pavements Corp. of California* v.

spondents and give nothing in return. It does contend that under the circumstances it is not obligated to perform the contract in the sense that it is now required to pay for what it has received the strict measure of consideration called for by the contract itself. To do so would conflict with the decision of the Commission and be contrary to the public interest. The solution must be found in the equities of the situation. In other words, the respondents should receive fair and reasonable compensation for what they have given, even though they cannot enforce the contract itself. This is entirely consistent with the holding of this Court in *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 486.[19]

The record in this case indicates that the property received by petitioner from respondents under the contract of April 1943 had a value between $40,000.00 and $70,000.00 (R. 95). The record also discloses that prior to the decision of the Commission condemning the contract, petitioner had already paid to respondents under the contract the sum of $149,408.38 (R. 89). Petitioner has at all times been willing to have a determination made as to the fair value of what it received from respondents under the contract, and if it should be determined in a proper proceeding that the value exceeds what petitioner has already paid, then petitioner stands ready to pay the balance. But this is an entirely different thing from paying 15% of the gross income from the operation of the radio station, as called for by the condemned contract, without reference to the fair value of what petitioner received.

Hutchinson Co., 22 Pac. (2nd) 534; *Peckham* v. *Industrial Securities Co.* (Del.) 113 Atl. 799; *Pabst Brewing Co.* v. *Howard* (Mo.) 211 S.W. 720; Restatement of Contracts, Par. 458.

[19] Accord, *Ryan* v. *KVL, Inc.*, 198 Wash. 459, 88 Pac. (2nd) 836, where it was held that failure to obtain Commission approval of a contract for sale of a radio station excused performance under the contract, but under the doctrine of equitable rescission the promisee was awarded the fair value of his full performance, less what he had already received in return.

In their brief in opposition to petition for certiorari (pages 8, 9), respondents argue that even if it became improper or illegal for a percentage of the funds derived from the operation of the station to be paid to respondents under the contract this would not relieve petitioner from its obligation to pay for the property which it has received and converted to its own use. They contend further that the state court has power to enforce this obligation, citing *N. Y. Central & H. R. RR. Co.* v. *Gray*, 239 U. S. 583. The *Gray* case is, however, certainly no authority for the proposition that where the Commission has found performance of the contract in accordance with its terms to be contrary to the public interest, a state court may nevertheless, without regard to the findings and conclusions of the Commission, render a judgment which in effect requires performance of the contract in accordance with its terms. What the *Gray* case does hold is that where performance of the promise in accordance with its terms becomes impossible as a matter of law, the promissor is not relieved of the equitable duty of paying the *reasonable value* for what he has received. Petitioner has consistently taken the position that the findings and conclusions of the Commission do not relieve it of the equitable duty of paying the reasonable value for what it has received from the respondents. But the measure of the respondents' rights under this principle would not be the provisions of the contract found contrary to the public interest, but rather the *reasonable value*, the fair value of the property petitioner has received, determined under applicable principles of quasi-contract. This, then, is clearly a case for the application of the principle of equitable rescission.[20] The *Gray* case states no more than this principle.

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[20] Cf: *Ryan* v. *KVL, Inc.*, 198 Wash. 459, 88 Pac. (2nd) 836; Note, 49 Columbia Law Review 855, 857 (June 1949).

Conclusion

We submit, therefore, that the judgment below should not be permitted to stand. It constitutes the clearest kind of collateral attack on the decision of the Commission in violation of Article VI of the Constitution. It invades the jurisdiction of the Commission as to matters exclusively vested in the Commission by Act of Congress, and substitutes the judgment of the state court for that of the expert body created by federal statute to determine such matters. The issues raised in this case go to the very foundation of the concept of administrative law. The decision below, unless set aside, will not only destroy the power of the Federal Communications Commission to effectively control the business of radio broadcasting in the public interest, as contemplated by the Congress, it will at the same time undermine the validity, dignity and effectiveness of all decisions and rulings of administrative agencies enforcing federal laws. It is submitted that such a thwarting of federal public policy should not be permitted, and that the judgment of the Court of Appeals of Georgia should be reversed.

Respectfully submitted,

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APPENDIX A

Applicable sections of the Communications Act of 1934 (Chap. 5, Title 47, USCA) not quoted in the petition or brief:

"Sec. 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act."

"Sec. 308 (b). All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

"Sec. 309 (a). If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event that Commission upon examination of any such application

does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

"Sec. 310 (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

"Sec. 402 (b). An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of any existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

"Sec. 402 (c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public

announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal."

"Sec. 402 (d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party."

"Sec. 402 (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court

shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

(5090)